

Competition Law

ALERT

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Who will blink first?

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Paying for news

The most notable examples involve social media and search platforms responding to requirements to pay for news that appears on their feeds. For example, in 2021, the Australian Competition and Consumer Commission (ACCC) developed the News Media and Digital Platforms Mandatory Bargaining Code, requiring tech giants and social media players to pay local news publishers or face substantial fines of AUD 10 million, 10% of turnover in Australia, or three times the benefit obtained as a result of the breach. Australia's Minister of Communications stated that the code was Australia's answer to combatting market power held by the "digital giants" through replicating commercial negotiations that notionally would occur where "there was not a large imbalance of bargaining power".

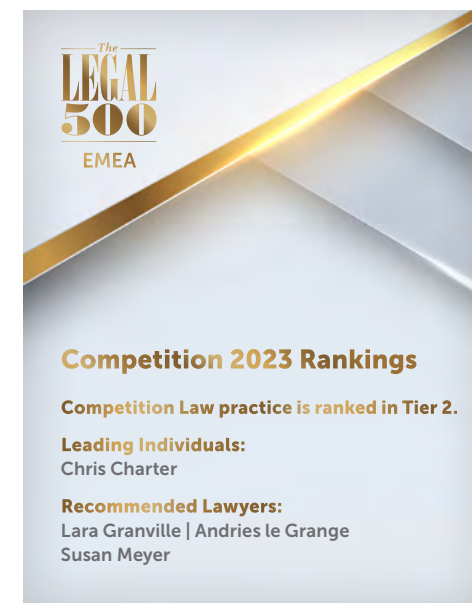
However, in February 2021, Australians woke to discover that all news links had been removed from Facebook's platform. This was not

a new ploy – when Spain tried to force Google to pay for news in 2014, the search platform blocked news for seven years.

A similar situation arose more recently, in June 2023, when Meta blocked people in Canada from viewing or posting news links and audiovisual news content on its social media platforms (and Google suggested it would follow suit) in response to Canada's Online News Act. The Canadian law also requires big tech companies to negotiate with and pay local news outlets fees for showing their content.

Australian Prime Minister Scott Morrison presented one side of the argument by saying that "Facebook's actions to unfriend Australia, cutting off essential information services on health and emergency services, were as arrogant as they were disappointing."

On the other hand, the stunt also resulted in traffic to news websites in Australia sinking 13%. The same occurred back in 2014 in Germany,



Who will blink first?

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when Germany's biggest news publisher, Axel Springer, tried to block Google from running snippets of its articles. After just two weeks, traffic to its site plunged. The impact is severe, limiting the reach of the media outlets who are supposed to be protected by these laws, as well as removing reliable news sources (a dangerous situation in the world of social media, where users may be subject to misinformation from unverified sources).

These significant outcomes either demonstrate that we are doomed to be subject to corporate might, or that such regulation is uncalled for and excessive, and the platforms may be left with no option but to demonstrate their importance to the news market through these extreme steps.

Television services in Malawi

Heavy-handed regulation without sufficient engagement with the regulated, appears to have led to

television services being suspended in Malawi. Africa's leading entertainment company elected to shut down its service in Malawi after a disagreement with the Malawi Communications Regulatory Authority (**MACRA**). MACRA imposed a MWK 10 million fine for a price hike implemented by the company in July 2022 and ordered the entertainment company to refund all its subscribers over a failure to secure approval prior to implementing the price increase.

The company took MACRA to court, but during the course of the court proceedings, MACRA obtained an interdict preventing the operator from modifying its prices.

The local company could not change the tariffs itself, because prices were determined at the holding company level. As a result, the interdict order handed down to the entertainment company in Malawi was incapable of being implemented by the local

entity (while also carrying with it significant consequences for its directors and management, including imprisonment), and therefore it stopped providing the service in Malawi. The company stated that, *"given the increasingly adverse regulatory environment"* it was left with no option but to terminate the service in Malawi.

The situation appears now to have been resolved – the parties met in Lilongwe and *"reached an agreement and understanding which will see the resolution of the matter and resumption of services in Malawi by Friday, 8 September 2023."* The terms of the resolution are not clear, but perhaps such engagement could have occurred between the regulator and regulated earlier in the process, without consumers losing access to often crucial services.



Who will blink first?

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Indeed, some engagement between the authorities and companies may be the most practical way to avoid pushing powerful companies into demonstrating their might in a manner that has unintended consequences.

The South African Competition Commission often uses its own negotiating power to reach agreed outcomes with the firms it regulates. It appears to have taken this approach in coming to some of the remedies in its online intermediation platform market inquiry, and it is well known for securing a range of extensive public interest commitments in

merger filings, through negotiation. While it has been criticised for using its regulatory power to secure outcomes which some argue may go beyond what the law requires, the process by necessity involves listening to regulated companies and understanding where regulation may push firms too far. In such cases, pragmatism will often facilitate regulation that would otherwise be tied up in litigation or result in companies taking extreme measures to the detriment of consumers.

[Lara Granville and Leago Mathabathe](#)



Cliffe Dekker Hofmeyr

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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